

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Public Notice # 26 - Data Sought)	
On Uses of Spectrum)	GN Docket Nos. 09-47, 09-51, 09-137
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TO: THE COMMISSION

Federal Communications Commission
Office of the Secretary

**Comments of National Religious Broadcasters in Response to
Public Notice – Data Sought on Uses of Spectrum – NBP Public Notice # 26**

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*A member in good standing of the bar of the Supreme Court of the United States, and a member in good standing of the bar of the Virginia Supreme Court, as well as a member of various courts in other jurisdictions; Mr. Parshall's bar licensing complies with 47 CFR 1.23(a).

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SUMMARY AND INTRODUCTION

National Religious Broadcasters (NRB) is a non-profit association that exists to keep the doors of electronic media open and accessible for religious broadcasters. We have more than 1400 members, most of whom are radio and television broadcasters that produce and/or telecast religious programming. Of those, a significant number are television licensees which will be impacted negatively by reallocation of television spectrum. Such an allocation would ignore the legal and constitutional questions that would arise considering the likely disproportionate impact on Christian broadcasters.

Further such an allocation would ignore the non-profit, donor-driven model of Christian television, would ignore the past investment of public donors to such television stations, and disregards the substantial contribution that Christian over-the-air television broadcasters make to their local communities.

I. DISCUSSION

A. General Approach to Spectrum Assessment

Question # 3. What would be the impact to the U.S. economy and public welfare if the coverage of free over-the-air broadcast television was diminished to accommodate a repacking of stations to recover spectrum?

NRB presumes that the term “public welfare,” includes such things as compliance by the F.C.C. with existing legal and constitutional standards, and believes that violation of those standards would be contrary to “public welfare.” In that regard we note one media scholar, who was recently appointed to a consulting position within the F.C.C., has suggested the following: “ ... a simple way of achieving that [i.e. reallocating spectrum

“to new uses”] would be to reclaim spectrum devoted to *lower valued uses* from the existing licensees, to allocate it to higher valued uses ...” (emphasis added) ¹

Professor Stuart Benjamin, the media scholar in question, suggests that the standard should be this: reallocation of spectrum should be according to those “new uses that the public would value more highly.” ² But exactly how would the F.C.C. determine the public’s value judgments about spectrum uses? Would the methodology be exacting, statistically valid, non-biased, and free from any presumptive value judgments of the Commission? Or would the Commission act as public surrogate, determining which specific uses it believes are more in the “public interest” than others?

But there is a larger problem. NRB is concerned that religious broadcasting, and specifically Christian broadcasting, would be relegated to a lower tier of public utility, and therefore would be targeted for greater spectrum seizure.

As an example, our Christian television broadcasters rely on current “must carry” regulations to gain optimal coverage, and do not, as a general rule, enter into retransmission agreements. As a result, there is no standard market index for the economic “value” of Christian television programming from a macro-broadcasting viewpoint. Does that mean, therefore, that Christian stations would be more susceptible to being viewed as being of lower “value,” and therefore more likely to lose spectrum? Furthermore, our T.V. members generally operate as non-profit structures and rely on public donations for operational costs, further distinguishing them from traditional

¹ Stuart Minor Benjamin, *Roasting the Pig to Burn Down the House: A Modest Proposal*, Duke Public Law & Legal Theory, Research Paper Series No. 251, May 2009, J. On Telecomm. & High Tech. L. Vol. 7, page 96 (2009). Professor Benjamin has recently been appointed to serve as Distinguished Scholar in Residence, in matters of spectrum reform, at the Federal Communications Commission.

² Benjamin, Id.

commercial broadcasting models. In fact, an argument could be made that religious broadcasters who are supported by public donations have a clearer indicia of “value” in the eyes of the public than broadcasters who rely on advertising. Thus, should that fact not, in itself, be evidence of satisfactory viewer “value,” i.e. whether a station is capable of self-supporting itself in a given market through donations? However, given the lack of definitional clarity in this Public Notice regarding the use of terms like “value,” and “benefits” in discussing the balance of broadcast versus broadband, the answer to that question is presently a mystery.

We are very concerned that Christian broadcasting may be detrimentally impacted disproportionately by forced spectrum reallocations. By way of comparison, there is a presumption that increased children’s programming is a public good.³ However, it is likely that any suggestion for any mandatory hourly minimum of religious programming on television would be met with vociferous objections that those mandates would violate the Establishment Clause of the First Amendment. Troublesome “separation of church and state” considerations threaten to prevent Christian broadcasters from being viewed as a form of “public good” similar to other public interest programming. even though our television members provide a wide variety of public benefits: charitable projects, humanitarian information, educational instruction, and of course content that meets the spiritual needs of viewers in a way that could never be met by the general market, whether broadcast or broadband.

If spectrum reallocation is ordered in some fashion, and Christian broadcasters are substantially impacted, the Commission could well run afoul of existing religious liberty

³ Professor Benjamin suggests at least a five-fold increase of mandatory children’s programming per week. *Id.* At 103.

protections, to-wit, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(a), as further amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) 42 U.S.C. § 2000bb-2(4), 2000cc-5(7)(A) (collectively referred to herein as “RFRA”).

RFRA offers a superior protection for religious expression and religious exercise that goes far beyond that afforded under the Free Exercise of Religion jurisprudence of the Supreme Court. RFRA was passed by Congress in response to *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where the Supreme Court “held that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.” *Gonzales v. O Centro Espirata Beneficente Uniao Vegetal et al.*, 546 U.S. 418, 424 (2006). RFRA “adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.” *Gonzales*, 546 U.S. at 424.

RFRA requires that any arm of the federal government that “substantially burdens” religious practices, can only do so if it meets two separate requirements: first the government must demonstrate that its regulation advances a “*compelling*” governmental interest; second that its action is the *least restrictive means* of accomplishing that interest. These two requirements of *compelling interest* and *least restrictive means* are a formidable hurdle, because they forge a legal test that “is the most demanding test known to constitutional law.” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (invalidating RFRA as to the states; however RFRA continues to be applicable to federal action, e.g. *Gonzales, supra* at 423: “... the Religious Freedom Restoration Act of 1993, which prohibits the *Federal* Government from substantially burdening...”)

(emphasis added). Further, when the D.C. Circuit Court of Appeals considered RFRA in the context of F.C.C. regulations and administrative actions, it did *not* suggest that its provisions would not otherwise apply to actions of the F.C.C. if they substantially burden religious licensees. See: *Lutheran Church-Missouri Synod v. F.C.C.*, 154 F.3d 487, 490-491 (D.C. 1998).

In addition, if religious broadcasters are treated unfairly, or targeted for excessive reallocation of spectrum, the Free Exercise Clause still gives them a remedy. See: *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, (1993) (" [A] law targeting religious beliefs as such is never permissible"). *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2^d Cir. 1995) (applying *Hialeah* to a zoning code that was targeted at Orthodox Judaism).

Question # 4 How do television broadcasters use the capabilities of digital television today? Please provide information on data rate allocations to HD, SD, multicast streams, bandwidth leasing arrangements, etc. and the business rationale behind these choices.

One of NRB's member TV stations provides the following information:

"We currently pass a standard definition signal to our viewers, but we recently finished a capital campaign (\$222,000) with our donor base that raised the necessary capital to upgrade our facility so we can pass a 1080i, full 6Mhz, broadcast signal throughout our coverage area. We will have this new upgraded signal that our viewers have supported with their gifts to our station by June 30, 2010.

"Once this is accomplished in June 30, 2010 we also plan to raise the capital needed, a modest \$35,000, to be able to broadcast on our primary channel, 40-1, a 720i HD signal and one standard definition signal on 40-2. We believe this second channel

will be launched by December 1, 2010. This signal will be programmed with significantly more frequent weather updates than our primary signal, but will also provide a dedicated channel to the Worship & Scripture Scenery genre of programming that our viewers desire more of, but cannot be expanded, easily, on our primary 40-1 HD broadcast signal.

“The ‘business rationale’ behind this model is that we can offer the HD signal that our program providers want us to broadcast while at the same time meets our viewers requests for the new standard definition channel mentioned above. The business model is that when we provide a service that our viewers want that they support our non-profit channel with more gifts. Our station, unlike for-profit corporations, does not exist to profit, but our revenues must exceed our expenses or we will eventually cease to exist and therefore not be able to serve our viewers with our specific genre (religious) of programming. Religious broadcasters, unlike Public Broadcast Stations, receive exactly zero dollars from local state and government tax dollars. We exist and thrive because we are supported solely by our viewers.”

Question # 5. How do broadcasters plan to use licensed spectrum in the future?

See our response to question # 4 above.

- a. What innovations in applications, services, or business models will create synergies between broadband and broadcast services, or other new value from currently licensed spectrum?**

We believe the Commission should thoroughly investigate the possibility of technological solutions whereby both over-the-air broadcast and IP broadband can be utilized through the same television set. One company, Sezmi Corporation, asserts it has

developed a T.V. set-top device that will accomplish that, and will maximize the utility of both broadcast and broadband.⁴

Question # 6. Consumers are migrating away from mass-market “appointment” viewing to more fragmented and time-shifted viewing. What impact will this trend have on the television broadcasting industry? What can the Commission do to help broadcasters participate in this evolution?

One of our television members provides the following:

“We have not found this to be true at our station. Our average age viewer is 67 years old. They are late-adopters of new technologies and watching chronological broadcast television is perfectly fine with them. Some of our viewers may DVR’s a program from time to time, but our gift income that supports this station continues to expand, each year, for the past 11 years of our existence, largely due to the fact that our viewers are older and not caught up in the latest technology. Also, because our station is not financially driven by 30 second spot commercials, but by viewers that support the station, it does not effect us negatively if someone does DVR a program and watches it at another point in time.”

Question # 7. (exerpt) In the Telecommunications Act of 1996⁵, Congress instructed the Commission to conduct an evaluation of the advanced television services program within 10 years after the date the Commission first issued licenses for such services. Subsection (1), which requires an assessment of the willingness of consumers to purchase the television receivers necessary to receive broadcasts of advanced television services may no longer be pertinent in light of the completion of the digital transition.

NRB is concerned about the waste of public money spent on television sets with antennae if broadcast television will be diminished. While admittedly the market for pay-

⁴ See: “Sezmi – A New Service for DTV,” NAB TV TechCheck, December 14, 2009.

⁵ See Telecommunications Act of 1996, Pub. L. No. 104-104, §336(g), 110 Stat. 56 (1996) (codified at 47 U.S.C. Section 336 (g)).

TV is growing, many houses now utilize multiple television sets. Many of those homes may have combinations of both cable and antenna television. These investments by the public needs to be qualified and respected.

B. Potential Approaches to Increase Spectrum Availability and Efficiency

Question # 1. What are the advantages of a channel-sharing approach to broadcasters' business? What are the disadvantages of this approach? What are the technical and business requirements to enable successful channel sharing?

NRB seems little or no advantage. One of our member stations notes that it needs to be able to use the whole 6Mhz in a flexible manner because their viewers wish to watch programming in HD, (1080i or 720i) together with their one channel of standard definition television for their new worship/Bible "scenery" subchannel that is to be launched next year. Without the ability to be flexible in their use of the entire 6Mhz that station will not be able to have enough spectrum to meet future desires of viewers, in such programming areas as local political elections (last fall that station broadcast a live general election debate for mayor of a large city, and broadcast another debate dealing with a proposed gambling amendment to the state constitution that would have directly impacted the city of license through the planned establishment of a casino there).

Question # 2. What opportunities exist to free up broadcast spectrum through greater collocation of transmission facilities closer to the center of densely populated areas? There are numerous examples of broadcasters collocating facilities already. What are the financial and other benefits of collocation? What are the tradeoffs for

broadcast TV stations and consumers in terms of signal coverage and local programming efforts?

An NRB member TV stations indicates the following: “Our signal is broadcast from Jasper Michigan. Due to the fact that we need to maintain Canadian interference requirements we are located about 25 miles from our city of license as compared to about 4 miles for the other Toledo, Ohio city of licensed broadcasters. Because of our location we are able to provide a quality signal to about 1,500,000 more people (compared to our analog channel 40UHF signal and we now maintain a digital channel 5 VHF signal) in Ohio and Michigan that otherwise would not be able to receive a good reliable DTV signal from the other Toledo licensed broadcasters. We have no desire to move to another geographic location or to another frequency assignment because we want to continue to provide service to all the people that we have served in the past and now with our digital VHF channel 5 signal, the additional 1,500,000 people that can now receive our broadcasts since the DTV transition.”

C. Broadcasting and the Public Interest

Broadcasters have historically played an important role in advancing public interests through free over-the-air broadcast TV. What are the benefits of free, over-the-air television broadcasting, in particular with respect to public awareness of emergency information, local news, political discourse, and education?

Considering the non-profit, public donation-supported structure of Christian television, enabled by must-carry regulations, our viewers are able to receive the benefit of our programming without any increase cost being passed to consumers through their monthly pay-TV subscriptions. Retransmission agreements necessarily create costs that must be transferred to the public. Because Christian television does not engage in these

retransmission agreements, those costs to the public are avoided. See also our answers to questions A. 4. and B. 1 above regarding such programming as expanded local weather and live, local public issue debates that are carried on Christian broadcasts.

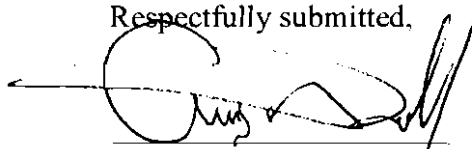
II. CONCLUSION

For the foregoing reasons, we request that the F.C.C. refrain from any form of television spectrum reallocation as it may well impair, or substantially burden Christian television broadcasters. Further, we recommend that the Commission investigate other means by which broadband can be served without sacrificing broadcast spectrum.

Dated this 21st day of December, 2010

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Craig L. Parshall', written over a horizontal line.

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